Office-Supreme Court, U.S.
FILED
AUG 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-241

In the Supreme Court of the United States

OCTOBER TERM, 1982

MOBAY CHEMICAL CORPORATION

and

PENNWALT CORPORATION,
Petitioners,

vs.

ANNE M. GORSUCH, Administrator, United States Environmental Protection Agency,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Is the right to exclude others from the use and enjoyment of private trade secret research submitted to the Federal Government in the confidence derived from both State and Federal law that such research would not be subject to adverse use or public disclosure an interest in "property" within the meaning of and the protections afforded by the Fifth Amendment?

2. Are sections 3(c)(1)(D), 3(c)(2)(A) and 10(d)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§136-136y ("FIFRA"), unconstitutional in that they exceed the commerce power of Congress under Art. I, § 8, cl. 3 of the Constitution or violate the Fifth Amendment because they effect a governmental deprivation and taking, prospectively and retroactively, of private property (a) without due process, (b) not for public purposes, or (c) without just compensation?

3. Is section 3(c)(1)(D)(ii) of FIFRA unconstitutional in that it constitutes an impermissible delegation of legislative power or violates the Fifth Amendment because it effects a deprivation of property and liberty of contract without due process and precludes any judicial determination of compensation?*

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*The parties to the proceedings before the Court of Appeals are set forth in the caption.

Mobay Chemical Corporation, a New Jersey corporation, has one subsidiary, Chemagro Ltd., a Canadian corporation, which is wholly-owned by Mobay. Mobay is a wholly-owned subsidiary of Rhinechem Corporation, a Delaware corporation. Rhinechem Corporation also owns the majority of the stock of the following domestic corporations: Miles Laboratories, Inc., Cutter Laboratories, Inc., Helena Chemical Company and Haarmann & Riemer Corporation. Rhinechem Corporation is a wholly-owned sub-

(Continued on following page)

Footnote continued—

sidiary of Bayer International Finance, N.V., a Netherlands Antilles corporation which is, in turn, a wholly-owned subsidiary of Bayer AG, a publicly owned German corporation.

Petitioner Pennwalt Corporation is a publicly owned Pennsylvania corporation. Its domestic subsidiaries are all wholly-owned. Its foreign subsidiaries and affiliates are wholly-owned except for the following: Decco-Roda S.p.A.; Electroquimica Pennwalt, S.A.; Industria Chimica del Ticino, S.p.A.; Industria Chimica di Termoli; Industria Quimica Pennwalt, S.A.; Japan Thiochemical Co., Ltd.; Lucidol Yoshitomi, Ltd.; Nitrogeno Industrial y Alimenticio, S.A.; Pan-Lux, S.p.A.; Pennwalt India Limited; Pennwalt Venezolana, C.A.; Quimica Pennwalt, S.A.; and Waltiernan Dormas (Pty.) Ltd.

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Petitioners respectfully request that the Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 22, 1982, in its cause Nos. 81-2190, 81-2191 and 81-2469.

OPINIONS BELOW

The opinion of the Court of Appeals, set forth in Appendix A, is not yet reported. The opinions of the District Court for the Western District of Pennsylvania, set forth in Appendix B, are reported at 517 F.Supp. 252 and 254. The opinion of the District Court for the Eastern District of Pennsylvania, set forth in Appendix C, is not reported.

JURISDICTION

The opinion of the Court of Appeals for the Third Circuit was filed and its judgment was entered on June 22, 1982 (App. A, A1, A20). This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Art. I, §8, cl. 3 of the Constitution of the United States which provides Congress the power "[t]o regulate commerce . . . among the several States," and the Fifth Amendment which provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

It also involves sections 3(c)(1)(D), 3(c)(2)(A) and 10(d)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, commonly known as FIFRA, the pertinent provisions of which are set forth in Appendix D.

STATEMENT OF THE CASE

Petitioners have played leading roles in the research and development of agricultural pesticides which are systemic, selective and non-persistent in the environment. To conduct this research has required the retention of hundreds of highly-trained scientists and supporting personnel, as well as the acquisition, development and maintenance of elaborate and diverse research and experimental facilities and of complex and expensive equipment. The resulting research is the culmination of years of painstaking effort and multi-millions in annual expenditures. Mobay's research alone now consists of more than 70,000 studies, which have been computerized to facilitate utilization by its personnel. The direct, historical costs incurred by Mobay in developing this research now exceeds $100,000,000.

Prior to the introduction of their products into interstate commerce, and since 1972, intrastate commerce, petitioners have submitted, in confidence, their extensive and invaluable research to the Government in demonstration of the efficacy and safety of their products. That their research is so submitted does not delimit its significance. It is the research which defines and guides their development of their pesticide products. It is continuously used by them in the discovery and development of new products and in the improvement of and development of new formulations and new uses for their present products. Petitioners maintain the confidentiality of their research and the Environmental Protection Agency ("EPA") and EPA's predecessors have also. It is undisputed that their research affords petitioners a significant competitive advantage in the conduct of their respective businesses, and the Government concedes that much of it contains or relates to trade secrets or confidential commercial information. This re-

search is, in fact, a unique "compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Section 757, comment b, *Restatement, Torts* (1939). It provides a "competitive advantage . . . of virtually incalculable value." *Pennwalt Corp. v. Gorsuch*, Civ. No. 80-2400 (E.D. Pa. April 10, 1981).

FIFRA was originally enacted in 1947 to require the registration of all pesticides shipped in interstate commerce. Act of June 25, 1947, ch. 125, 61 Stat. 163. Under section 4 of the 1947 FIFRA, the registrant of a pesticide was required to file with the Secretary of the United States Department of Agriculture, *inter alia*, a complete copy of the labeling and a statement of all claims made for the pesticide, including directions for use, and "if requested by the Secretary, a full description of the tests made and the results thereof upon which the claims are based."[1]

Section 3c(4) of the 1947 FIFRA made it unlawful for any person to use for his own advantage or to reveal "any information relative to formulas of products acquired by authority of section 4 of this Act." Moreover, regulations of the Department of Agriculture consistently provided for the confidentiality of the research submitted by registrants of pesticides.[2]

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1. FIFRA was administered by the Department of Agriculture until December 2, 1970. At that time these responsibilities and those of the Department of Health, Education and Welfare, which through the Food and Drug Administration established tolerances for pesticides, were transferred to EPA under the provisions of Reorganization Plan No. 3 of 1970, 84 Stat. 2086.

2. *See, e.g.*, 7 C.F.R. §1.3(b)(1)—1949 ed., providing that applications and supporting data would be available only to persons who furnished the material, or under compulsory process; and 7 C.F.R. §1.4(b)(15)—1962 ed., and 7 C.F.R. §1.4(b)(15)—1967 ed., providing that data concerning products and formulations provided by industry in connection with registration were administratively confidential.

On October 21, 1972, FIFRA was extensively amended by the Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973. Section 3(c)(1) of the 1972 FIFRA continued to require an applicant for registration to file, *inter alia*, a complete copy of the labeling and a statement of all claims made for the pesticide, including directions for use, and "if requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based." However, section 3(c)(1)(D) provided that the research submitted in support of an application for registration

> "shall not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless such applicant shall have first offered to pay compensation for producing the test data to be relied upon and such data is not protected from disclosure by Section 10(b)."

Section 10(b) provided:

> "Notwithstanding any other provision of this Act, the Administrator shall not make public information which in his judgment contains or relates to trade secrets or commercial or financial information obtained from a person and privileged or confidential . . . ."

Section 3(c)(1)(D) applied to all data submitted under FIFRA prior to the 1972 amendment and became effective immediately upon enactment. *Mobay Chemical Corp. v. Train*, 394 F.Supp. 1342 (W.D. Mo. 1975); *Mobay Chemical Corp. v. Costle*, 447 F.Supp. 811 (W.D. Mo. 1978); *Amchem Products, Inc. v. GAF Corp.*, 594 F.2d 470 (5th Cir. 1979). Section 10(b) likewise applied to all data and became effective immediately. Moreover, in its provisions Congress embodied the definition of "trade secret" artic-

ulated in the *Restatement, Torts* (1939). *Mobay v. Costle, supra; Chevron Chemical Co. v. Costle,* 443 F.Supp. 1024 (N.D. Cal. 1978). The trade secret research submitted under FIFRA was thereby protected from public disclosure. Further, if the research submitted was not information protected from disclosure by Section 10(b), it could be used by EPA for the benefit of another only if the submitter first granted EPA permission to use it, or the person for whose benefit the research would be used agreed to pay the submitter reasonable compensation for producing it. If, on the other hand, the research was "trade secret," including confidential "commercial or financial information," within the meaning of Section 10(b), then, without the submitter's prior permission, it could not be used by EPA for the benefit of any other person.

On November 28, 1975, Section 3(c)(1)(D) of the 1972 FIFRA was amended to apply to "data submitted on or after January 1, 1970."[3] Act of November 28, 1975, Pub. L. No. 94-140, 89 Stat. 751.

The effect of this amendment was construed by the Court in *Mobay Chemical Corp. v. Costle,* 439 U.S. 320 (1979). It there held that "FIFRA, as amended, does not at all address the issues of the conditions under which pre-1970 data may be used in considering another application," and that "[i]t neither authorizes, forbids, nor requires"

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3. As amended, section 3(c)(1)(D) provided:

"[I]f requested by the Administrator, a full description of the tests made and the results thereof upon which the claims are based, except that data submitted on or after January 1, 1970, in support of an application shall not, without permission of the applicant, be considered by the Administrator in support of any other application for registration unless such other applicant shall have first offered to pay reasonable compensation for producing the test data to be relied upon and such data is not protected from disclosure by Section 10(b)."

EPA's use of a submitter's research for the benefit of his competitors. *Id.*

FIFRA was again amended on September 30, 1978, by the Federal Pesticide Act of 1978, Pub. L. No. 95-396, 92 Stat. 819.[4] Section 3(c)(1)(D) was amended to pro-

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4. On May 21, 1979, Mobay filed its complaint against Douglas M. Costle in his then official capacity as Administrator, United States Environmental Protection Agency, in the United States District Court for the Western District of Pennsylvania. Said complaint sought, *inter alia*, declaratory relief that sections 3(c)(1)(D), 3(c)(2)(A) and 10(d) of the 1978 FIFRA were unconstitutional, and injunctive relief precluding EPA's use of and disclosure of Mobay's research pursuant to said sections. Mobay's action was alleged to arise under, *inter alia*, the Constitution of the United States including Art. I, §8, cl. 3 thereof and the Fifth Amendment thereto, the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §§2201 and 2202, and FIFRA. The District Court's jurisdiction was alleged under 28 U.S.C. §1331(a) and sections 16(a) and (c) of FIFRA, 7 U.S.C. §§136n(a) and (c). On July 13, 1979, Mobay filed a first amended complaint which was identical to its complaint in the above respects.

On or about June 23, 1979, the EPA filed a motion in the District Court for the Western District of Missouri to vacate and dissolve the existing injunction of that court which precluded EPA's adverse use and disclosure of Mobay's research. Said motion was thereafter transferred to the District Court for the Western District of Pennsylvania for resolution and disposition in accordance with that court's determination of Mobay's action.

Trial was commenced on August 18, 1980, and after 16 days of hearing, was concluded on October 15, 1980. On June 12, 1981, the District Court filed its memoranda and orders denying Mobay's claims and vacating the existing injunction. On June 22, 1981, the District Court issued its order staying EPA's adverse use and disclosure of Mobay's research for 90 days, and on September 24, 1981, issued its order extending this stay pending Mobay's appeal.

On June 20, 1980, Pennwalt filed its complaint against the United States Environmental Protection Agency and Douglas M. Costle in his then official capacity as Administrator, in the United States District Court for the Eastern District of Pennsylvania. It too sought, *inter alia*, declaratory relief respecting the unconstitutionality of sections 3(c)(1)(D) and 10(d) and injunctive relief precluding the use and disclosure of Pennwalt's research thereunder. Its action was alleged to arise under the Constitution of the United States, FIFRA, the Declaratory Judgment

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vide that except for certain limited "exclusive use" research submitted by petitioners after September 30, 1978, EPA may, without the permission of petitioners, use all of their research whenever submitted, including their trade secret research, to support the registration of their competitors' products. Any competitor seeking this use of petitioners' research is required only to show that he has made "an offer to compensate" for the use of certain of their research which was submitted after December 31, 1969. If the parties cannot agree on whatever compensation is offered by such competitor, he may compel petitioners to submit to a binding arbitration determination of compensation, all meaningful review of which by the courts is expressly denied. Further, the protection of section 10(b), which theretofore prohibited the disclosure of petitioners' trade secret research, was made subject to the limitation set forth in section 10(d)(1). EPA concedes that section 10(d)(1) makes available to the public almost all of petitioners' research. Even the limited information described in section 10(d)(1)(A)-(C) may also be disclosed in certain public proceedings.[5] Finally, sec-

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Footnote continued—

Act, the Trade Secrets Act, 18 U.S.C. §1905, and the Administrative Procedure Act. The court's jurisdiction was alleged under 28 U.S.C. §1331(a), §10(d)(3) of FIFRA, 7 U.S.C. §136h (d)(3), the Declaratory Judgment Act, and the Administrative Procedure Act.

On April 10, 1981, the District Court entered a preliminary injunction precluding EPA's disclosure of Pennwalt's research. On July 23, 1981, the District Court filed its decision denying Pennwalt's claims, and on July 31, 1981, issued its stay precluding EPA from disclosing Pennwalt's research pending Pennwalt's appeal.

On July 15, 1982, the Court of Appeals entered its order staying the entry of its mandate until August 13, 1982, to permit the filing of this Petition.

5. The public disclosure compelled by section 10(d)(1) is thus in no sense the "limited" disclosure intimated by the court below. Further, EPA has admitted that section 10(g), which pre-

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tion 3(c)(2)(A) compels EPA to make available to the public within 30 days after registration the trade secret research of petitioners which it uses to support the registration of petitioners' or of their competitors' products. The above use of and disclosure of petitioners' research will irreparably injure them in the conduct of their respective businesses, and will immediately and irrevocably confer a competitive advantage of incalculable value upon their domestic and foreign competitors.

REASONS FOR GRANTING CERTIORARI

This case presents issues of crucial concern to those who devote their resources to the discovery and development of agricultural chemicals denominated "pesticides" under FIFRA and who submit their trade secret research to EPA in demonstration of the efficacy and safety of their products.[6]

> "Certainly a better accommodation can be devised by the human mind, and it must be, if the industry is to succeed in developing the sophisticated pesticides which will be required in the years to come."

Footnote continued—

cludes disclosure to certain foreign and multinational pesticide producers, does not, e.g., inhibit disclosure to foreign governments, even though the purpose of section 10(g) is to preclude foreign and multinational pesticide producers from obtaining copies of the research submitted for purposes of resubmitting these copies to foreign governments to obtain registrations. As to the information contained in the research which is made publicly available by Section 10(d)(1), Dr. William A. Furtick, formerly, *inter alia*, Chief of the Crop Protection Service and Deputy Director of the Plant Production and Protection Division, Food and Agriculture Organization of the United Nations, testified below that section 10(g) "is like telling the Russians they can't read the Wall Street Journal."

6. The term "pesticide" is broadly defined in section 2(u) of FIFRA as meaning any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest and any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant.

Mobay v. Gorsuch, App. B, A22. Whether this better accommodation is required by the Constitution presents issues of critical import which far transcend FIFRA's provisions and affect all those who submit their trade secret research to the Government.

I. The Decision Below, Which Addresses and Negates Any Property Interest in Private Trade Secret Research Submitted in Confidence to the Federal Government, Presents a Novel and Important Question of Constitutional Law Which Has Not Yet Been but Should Be Addressed by the Court.

The decisions of the Court have not directly addressed, but lead unerringly to the conclusion that the right to exclude others from the use and enjoyment of private trade secret research submitted to the Government in confidence is an interest in "property" within the meaning of and protections afforded by the Fifth Amendment.

In *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945), the Court established that "property" is employed in the Fifth Amendment to denote

> ". . . the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . In other words, it deals with what lawyers term the individual's 'interest' in the thing in question. . . . The constitutional provision is addressed to every sort of interest the citizen may possess."

The Court has also established that ". . . the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category

of interests that the Government cannot take without compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). *See also Loretto v. Teleprompter Manhattan CATV Corp.*, ... U.S. ....., 50 U.S.L.W. 4988 (June 30, 1982).

Petitioners fully appreciate that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Here, however, petitioners' *right to exclude* respecting their trade secret research has long been recognized by *both* State and Federal law.

The quintessence of a trade secret is the secrecy of the information comprising it.[7] "The subject of a trade secret must be secret, and must not be of public knowledge or of general knowledge in the trade or business." *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475 (1974). "By definition a trade secret has not been placed in the public domain." *Id.* at 484. Of necessity, therefore, the owner of a trade secret can use it and exploit its value only if he can exclude others from its use and enjoyment. His right to exclude is thus the *sine qua non* of his interest in and ownership of this intellectual property.

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7. "Proprietary information, of course, is but one form of intangible personalty, in the same general category as stocks, bonds, mortgages, copyrights, letters patent, and the like. The major characteristic that distinguishes proprietary information from such other forms is that while the disclosure of A's ownership of a particular security in no way affects his ownership thereof or his rights therein, the disclosure of the tenor and content of proprietary information destroys its value as well as the property interest in it. The value resides not in the pieces of paper on which the information is recorded, but in the information itself. Once that information becomes public, the property aspect is gone."

Wearly v. F.T.C., 462 F. Supp. 589, 593 (D.N.J. 1978), *vacated on other grounds*, 616 F.2d 662 (3d Cir. 1980).

In *Kewanee Oil Co., supra*, the Court held that "[t]his necessary element of secrecy is not lost, however, if the holder of the trade secret reveals the trade secret to another 'in confidence, and under an implied obligation not to use or disclose it.'" 416 U.S. at 475. It there relied on the widely-accepted principles of section 757 of the *Restatement, Torts* (1939), which provides that

> "One who discloses or uses another's trade secret, without a privilege to do so, is liable to the other if . . . his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him . . . ."

The two protections afforded by State law to the owner of trade secrets are against unauthorized use and unauthorized disclosure of his secrets by those to whom he has submitted them in confidence. *Kewanee Oil Co.*, 416 U.S. at 475.[8] Together, they secure to him his right to exclude others from the use and enjoyment of his property.

The proper inquiry, however, does not stop here, nor do petitioners seek to superimpose State law upon any otherwise lawful activity of the Federal Government. Rather, it is clear that these two essential State law protections against unauthorized use and unauthorized disclosure were, prior to the 1978 FIFRA, also extended to petitioners under established principles and express provisions of Federal law.

The 1947 FIFRA made it unlawful for any person to use for his own advantage or to reveal any information

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8. Petitioners demonstrated that the appropriate States recognize and apply the principles of Section 757 of the *Restatement, Torts* (1939). *See, e.g., Sims v. Mack Truck Corp.*, 608 F.2d 87, 95 (3d Cir. 1979) with respect to Pennsylvania, and *Sandlin v. Johnson*, 141 F.2d 660, 661 (8th Cir. 1944) with respect to Missouri.

relative to formulas of products acquired pursuant to the Act's registration provisions. Further, the applicable regulations of the Department of Agriculture consistently provided for the confidentiality of the research submitted for purposes of registration. No provision of the 1947 FIFRA authorized or required the Government to disclose a registrant's research, nor did any authorize or require it to use his research for the benefit of his competitors. No regulations were ever promulgated under the Act which authorized or permitted such use or disclosure. Moreover, the Trade Secrets Act, 18 U.S.C. §1905, imposed criminal sanctions upon any Government officer or employee who published, divulged, disclosed, or made known in any manner or to any extent "not authorized by law" any information coming to him in the course of his employment or official duties which concerned or related to trade secrets. Having no authorization by law, either under FIFRA or elsewhere, the illegality of any Government use of petitioners' trade secret research for the benefit of their competitors and of any public disclosure of this research was firmly established under Federal law.[9] *See Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). *See also Hooe v. United States*, 218 U.S. 322, 335-36 (1910) (actions of officers of the United States without Congressional authority are not "in any legal or constitutional sense" actions of the Government, but rather actions in violation of the Constitution), and 5 U.S.C. §706(2)(B) (agency actions are unlawful if "contrary to constitutional right, power, privilege, or immunity").

In the 1972 FIFRA, Congress expressly recognized the principles of trade secrecy articulated in section 757

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9. In its response to certain interrogatories below, EPA averred that "all property rights which defendant acquires result from the fact that plaintiff has submitted the data to defendant *and any such rights are statutory in nature.*"

of the *Restatement, Torts* (1939), incorporating its protection against disclosure into the provisions of section 10(b) and, by direct reference, its protection against adverse use into the provisions of section 3(c)(1)(D). Further, in *Mobay v. Costle*, 439 U.S. 320 (1979), the Court made clear that the 1975 amendment to section 3(c)(1)(D) did not at all address the issues of the conditions under which data submitted prior to 1970 could be used by EPA, and that the section as then amended did not *authorize* or *require* any use of petitioners' trade secret research for the benefit of their competitors.

Thus, until the provisions of FIFRA presented for review, petitioners' right to exclude others from the use and enjoyment of their trade secret research was fully recognized by both applicable State and Federal law. This critical interest must be "property" protected by the Fifth Amendment.

II. The Decision Below That There Is No "Continuing Property Interest, Beyond That Provided by Federal Law, Applicable to Material Furnished to a Federal Agency As a Precondition to Selling a Product in Interstate Commerce" Is in Direct Conflict With Applicable Decisions of the Court and Would Afford the Congress Limitless Authority Virtually Unchecked by the Supreme Federal Law - the Constitution.

The rule pronounced by the court below in rejecting petitioners' claims is both new and startling (App. A, A8). It holds that persons who seek to engage in interstate commerce have no rights in and to whatever property Congress may require of them other than those rights Congress may, from time to time, choose to give or take away. In short, that Congress is wholly unrestricted by

the Constitution and may, by *ipse dixit*, prospectively and retroactively transform rights regardless of any inherent limitation of its power to regulate commerce or of any restriction of the Fifth Amendment.

It was not disputed below that petitioners developed and submitted their trade secret research in the confidence and expectation that others were precluded from the use and enjoyment of it. It cannot be disputed here that the challenged provisions take petitioners' right to exclude others from the use and enjoyment of their intellectual property and thereby destroy it. Section 3(c)(1)(D) deprives them of their right to prevent EPA from using their trade secret research for the direct benefit of their competitors.[10] Section 10(d)(1) deprives them of their right to prevent the public disclosure of their trade secret research, and Section 3(c)(2)(A) compels EPA to accomplish this public disclosure. The 1978 FIFRA thus deprives petitioners of the two essential protections which, together, comprise their right to exclude. Under the Fifth Amendment "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." *United States v. General Motors Corp.*, 323 U.S. at 378. Petitioners' "interest" in their trade secret research, assured by and consisting of their right to exclude, is destroyed by FIFRA's provisions. Because their trade secret research is intellectual property, petitioners' relation to it, which heretofore was denominated "ownership," is foreclosed by FIFRA. Their intel-

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10. There is no issue presented here, nor was there below, regarding EPA's internal use of petitioners' research for any purpose other than to support the registration applications of petitioners' competitors. The issue presented arises when a competitor submits an application to EPA, without any supporting research, and states in effect: "I seek to register a product which I believe is similar to one of Mobay's registered products. Please use the research Mobay submitted to you to support and to register my product. Thank you."

lectual property is committed to the public domain and is no longer susceptible of ownership by anyone. Rather it is "free as the air to common use." *International News Service v. The Associated Press*, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

FIFRA's challenged provisions are exercises by Congress of its power to regulate commerce. But are these provisions "regulations of commerce" within its commerce power?[11] And, if so, is the taking they accomplish for legitimate public purposes within the framework and limitations of the Constitution?

The 1978 amendment of section 3(c)(1)(D) was purportedly made to promote competition. Yet there is no case which holds that the use of one's property can simply be taken by the Government and given to his competitors under the guise of fostering competition. It is also an alien notion of competition which is advanced. The unequivocal and intended result of section 3(c)(1)(D) is to provide the use of petitioners' trade secret research to their competitors who have not "contributed in money, services, negotiations, skill, forethought, or otherwise" to its development. *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 78 (1937). There, the Court held that there is "no more glaring instance of the taking of one man's property and giving it to another" than is found in the forced sharing of the property and markets created by one

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11. As stated in the *Lottery Case*, 188 U.S. 321, 354 (1903):

> "It is to be remarked that the Constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In *Gibbons v. Ogden* it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress in prescribing a particular rule has exceeded its power under the Constitution.

person for the benefit of other private parties. *Id.* at 79. It further admonished that "this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Id.* at 80. However, because petitioners' competitors do not wish to or cannot meet FIFRA's exacting requirements, Congress in section 3(c)(1)(D) appropriated the results of petitioners' previous efforts and commitment of scientific resources for the use of their competitors, and further compels petitioners to give-up the results of their future efforts and commitment of scientific resources.

It was also once established that it was unfair competition in business to permit those who have not made any commitment of labor, skill and money to reap where they have not sown and to appropriate to themselves the harvest of those who have. *International News Service*, 248 U.S. at 239-40. Can the analysis be any different because Congress itself effects this result and calls it a "regulation of commerce"? Just what "commerce" is it regulating? It can only be the "commerce" of research and development. But the 1978 FIFRA does not in any way seek to promote competition in the commerce of research and development, nor can it be said that petitioners' exemplary efforts have had any adverse effects on this commerce. To the contrary, it is no rational or reasonable "regulation" of this commerce of research and development to confiscate the harvest of petitioners' past endeavors for use by their competitors and further to require petitioners to sow and reap for their competitors' benefit hereafter. Over 100 years ago the requisite public purposes for the exercise of the substantive powers of governments were clearly articulated. *Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655 (1874). Section 3(c)(1)(D) is not

"legislation" even though it be denominated a "regulation of commerce." It is "a robbery . . . done under the forms of law." *Id.* at 664.

The 1978 amendment of section 10 seeks justification in that it purports to further a "right of the public" to share in EPA's decision-making. This too is not any "regulation of commerce." When EPA approves the registration of a product, and its introduction into commerce is thereby permitted, no adulterated article of commerce is being foisted upon an unsuspecting public. Rather, it is a product which first has been subjected to the scrutiny of EPA (which has available to it all the scientific resources of the Federal Government and also of any private consultants it chooses), and which then has been determined by EPA to be safe and effective. The question, therefore, is whether Congress has in any sense enacted a "regulation of commerce" in its public disclosure of private trade secret research *after* the Government has already satisfied itself that the statutory objectives of FIFRA have been met.

Amended Section 10 does not seek to provide the consumer "fair information of what it is that is being sold," or to fairly set forth "the nature of the product."[12] These objectives are accomplished by the ultimate regulatory device of FIFRA—the label of the product. It is EPA's approval of this label (including not only the statement of the product's ingredients, every direction for and use of the product, and every precaution, but the

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12. The cases relied on by the court below, *Corn Products Refining Co. v. Eddy*, 249 U.S. 427 (1919), and *National Fertilizer Ass'n v. Bradley*, 301 U.S. 178 (1937), which held that States pursuant to their police powers could require products to be properly labelled, are patently inapplicable. In fact, EPA conceded below and it was further established that the sophisticated and complex scientific research to be disclosed pursuant to amended section 10 would be wholly unintelligible to any such consumer.

label's format and design as well) which accomplishes the registration of the product under FIFRA. Moreover, Sections 12 and 14 of FIFRA impose substantive civil and criminal penalties if, *inter alia*, false information is submitted to EPA for review in approving the label, if the product does not comport with its label, or if it is made available for use or is used in a manner inconsistent with its label.

Rather than providing fair consumer information, the objective of amended Section 10 is to permit the public to share in the regulation of pesticides. But does the Constitution permit the public any such direct participation in the regulation of commerce where instead, the Congress, the public's elected representative, has been delegated this power and responsibility. To answer affirmatively would hold that Congress may exercise its plenary power and, having exercised it and pursuant to such exercise having satisfied the Government's objectives, may then abdicate its power to or share it with the public. The latter must be beyond the power of Congress, and the disclosure of private trade secret research compelled by the 1978 FIFRA to this end found to be neither a "regulation of commerce," nor for any public purpose contemplated by the Constitution.

Finally, the deprivation and taking effected by the 1978 FIFRA is subject to the due process and just compensation requirements of the Fifth Amendment. *United States v. Cress*, 243 U.S. 316, 328 (1917); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 336 (1893).

In *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 589 (1935), the mortgage moratorium provisions of the Frazier-Lemke Act were held to violate the due process requirements of the Fifth Amendment. The issue there, as here, was whether the Act effected "the taking

of substantive rights in specific property acquired prior to the Act." *Id.* at 590. There, as here, the Act did not purport "to exercise the rights of eminent domain." *Id.* at 596. The Act was held void because it had ". . . taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantive value." *Id.* at 601.

As in *Louisville*, the taking of petitioners' trade secret research is accomplished solely and immediately by the 1978 FIFRA. It is a *de facto* eminent domain exercise which, in and of itself, deprives petitioners of their right to prevent the adverse use and disclosure of their research and gives their research to their competitors and the public. As in *Louisville*, no process, due or otherwise, is afforded by this statutory deprivation. *Louisville* holds that there is no constitutional short-cut which permits Congress to take directly by its legislative enactments and thereby avoid proceedings which assure petitioners the due process guaranteed by the Fifth Amendment.

The Fifth Amendment further requires that, contemporaneous with the taking accomplished by the 1978 FIFRA, there be just compensation or the assurance thereof which is the full and perfect equivalent of the property taken, and that this determination be a judicial one. *Monongahela Navigation Co. v. United States*, *supra*. *Here*, it is inconceivable that the "compensation" provided by section 3(c)(1)(D)(ii) constitutes either the contemporaneous just compensation or assurance thereof required by the Fifth Amendment for petitioners' trade secret research which is taken by FIFRA.

III. The Decision Below That FIFRA's Aberrant "Compensation" Scheme Passes Constitutional Muster Is in Direct Conflict With Applicable Decisions of the Court.

The "strange red-haired, bearded, one-eyed man-with-a-limp"[13] compensation scheme of the 1978 FIFRA is wholly at odds with established precedents of the Court.

Section 3(c)(1)(D)(ii) requires a competitor seeking to register his product upon the basis of petitioners' research to "offer to compensate" them. Failing agreement, the "amount and terms of compensation" are to be determined by an arbitrator appointed by the Federal Mediation and Conciliation Service ("FMCS") from the roster of arbitrators maintained by it. No governing criteria nor any policy is provided respecting what this "compensation" is to be. Judicial review, the usual safeguard against administrative excesses, is denied. *See American Power Co. v. S.E.C.*, 329 U.S. 90, 105 (1946).

In *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), Section 9(c) of the National Industrial Recovery Act was invalidated because that Act established no criteria to govern the authority delegated and declared no congressional policy. 293 U.S. at 415. Nor would assumed good motives save the provision, the defect being one of "constitutional authority, for which the best of motives is not a substitute." 293 U.S. at 420.

Here, FMCS, Congress' delegate under section 3(c)(1)(D)(ii), has complained that the legislative history fails to specify "a formula or other guidance on the valuation of data for compensation purposes." 44 Fed. Reg.

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13. *United States v. Grinnell Corp.*, 384 U.S. 563, 591 (1966) (Fortas, J., dissenting).

43293 (1979).[14] Nevertheless, FMCS, an agency without a roster of commercial arbitrators, without procedures or rules for the conduct of such arbitrations, and without any standards or policy, is charged by Congress in section 3(c)(1)(D)(ii) to appoint an arbitrator from this roster who will then follow these rules and procedures to reach an unreviewable decision of "compensation." FMCS, obviously befuddled with these newfound responsibilities, has now handed them to the American Arbitration Association, a private organization. 45 Fed. Reg. 55394-55400 (1980).

The unparalleled compulsory and binding arbitration scheme of section 3(c)(1)(D)(ii) deprives petitioners of their property and liberty of contract without due process of law and this alone renders the section unconstitutional. "Arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960). *Accord, Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962). Legislation requiring compulsory arbitration of matters of contract between two parties is unconstitutional in that it effects a deprivation of property

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14. It also advised, 44 Fed. Reg. 43293-94 (1979), that

"The Federal Mediation and Conciliation Service rarely arranges or conducts arbitration of commercial disputes. The service is in the business of helping to resolve labor disputes between employees and representatives of their employees. Among various means to further that purpose, FMCS maintains a roster of private labor arbitrators who do not handle commercial disputes such as the compensation disputes arising under FIFRA.

* * *

The Service does not promulgate procedures or rules governing labor arbitration proceedings because such provisions are set by the terms of collective bargaining agreements between employers' and employees' representatives as well as by the common law of labor arbitration, as it has developed over the years."

and liberty of contract without due process of law *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522, 544 (1923); *Dorchy v. Kansas*, 264 U.S. 286 (1924). Moreover, the compulsory arbitration here also unlawfully compels the parties to make an agreement. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). Section 3(c)(1)(D)(ii) is no Hobson's choice, but a devil's alternative. It compels petitioners either to submit to binding arbitration, to which they have never agreed, or to make an agreement, in fact *any* agreement, to avoid this procedure. This compulsion deprives them of their property and liberty of contract without due process.

Finally, even if petitioners' right to compensation for use of their research is limited to that set forth by Congress in Section 3(c)(1)(D)(ii), the denial of the right of meaningful judicial review must be found unlawful. In *Baltimore & O. R. Co. v. United States*, 298 U.S. 349 (1936), an ICC order prescribing divisions of certain so-called joint rates among the carriers was challenged on the grounds that the joint rates were confiscatory. The Court there stated that the carriers were not bound to accept the prescribed divisions. "Congress is without power, directly or through the commission, to require them to serve the public at rates that are confiscatory." *Id.* at 357. Here, however, even if the arbitrator's findings and determination are confiscatory "no official or court of the United States shall have power or jurisdiction to review any such findings and determination." (App. D, A126). The Constitution at least requires full judicial review of the findings and determination of the arbitrator.

CONCLUSION

The decision by the Court of this case is necessary to establish the protections afforded by the Constitution respecting the Government's use and disclosure of confidential intellectual property, and to prevent the Government's misappropriation and destruction of the private trade secret research at issue. The Court's resolution of the questions presented is important both to the Government and to many private parties. These questions are real, constitutional, continuing and substantial. Petitioners pray the Court issue its Writ of Certiorari.

Respectfully submitted,

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